

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability  
Complaint No. R5-2012-0542 (Sweeney Dairy)

Prosecution Team Rebuttal Argument and  
Rebuttal Evidence

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**PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE;  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2012-0542**

TO ALL PARTIES HEREIN;

PLEASE TAKE NOTICE that on July 9 or as soon thereafter as the matter may be heard, a Designated Party in the above-captioned matter, the Prosecution Team for the California Regional Water Quality Control Board, Central Valley Region ("Prosecution Team") hereby submits a response to Evidence and Policy Statements submitted by Sweeney Dairy on June 19, 2012.

The Prosecution Team continues to recommend a discretionary penalty in the amount of \$7,650 for the violations alleged in Complaint No. R5-012-0542. Furthermore, the Prosecution Team asserts that Mr. Sweeney's arguments challenging the legality of the underlying Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies and the failure of the Central Valley Water Board to grant relief from the reporting requirements at this juncture in an enforcement proceeding are improper, untimely, and should not be considered at the 2/3 August 2012 hearing.

**I. Background on Order No. R5-2007-0035 (Dairy General Order)**

The Central Valley Regional Water Quality Control Board (Central Valley Water Board) adopted Order No. R5-2007-0035, the Waste Discharge Requirements General Order for Existing Milk Cow Dairies (Dairy General Order) on 3 May 2007. Part of the General Order includes a

Monitoring and Reporting Program No. R5-2007-0035 (MRP), issued pursuant to the Central Valley Water Board's authority under California Water Code (CWC) section 13267. The MRP requires the submission of, among other things, annual monitoring reports every first of July. The annual report is comprised of three main reporting components; information detailing the crops planted and harvested during the calendar year, groundwater monitoring results for those dischargers that monitor supply wells and subsurface drainage systems, and stormwater monitoring results during the wet season. This information must be collected throughout the calendar year and cannot be recreated after-the-fact. The Prosecution Team is aware that the reporting requirements of the Dairy General Order, including the Annual Report, represent a cost burden on dairy producers in the Region. The Prosecution Team is also aware that the increased reporting requirements place a higher per-cow cost on small dairies in the region as opposed to large dairies. To offset this disparity and help reduce costs, the Central Valley Water Board has taken steps to assist dairy producers to undertake self-reporting whenever possible.

The Central Valley Water Board contracted with Merced County Division of Environmental Health to develop software available to assist dairy producers in the creation of the Annual Report. Development of this software was subsidized by money from a Proposition 13 Nonpoint Source Pollution Control Grant, and the software continues to be supported by contract funding from the Central Valley Water Board. It is available to dairy producers for free over the internet. The Central Valley Board engaged with several dairy interest groups, including the California Dairy Quality Assurance Program, to provide free training to producers on how to use the program. The software is a web-based computer program that is fairly simple to use, where data are entered by filling in the appropriate boxes. Producers are asked to input groundwater monitoring results and information about their annual crop production including the acreage and type of crops grown; results of wastewater and solid manure analyses; amounts of wastewater, manure, and chemical fertilizer applied to crops; plant tissue analysis; and the amount of manure exported off-site. This information is collated by the software, which generates a

completed annual report ready for submittal to the Central Valley Water Board. Dairy producers are still required to collect the necessary information for the report, and perform water quality testing, but the software reduces the need for small producers to hire outside consultants to complete the Annual Report on their behalf.

In his evidentiary submission, Mr. Sweeney references two Waste Discharge Requirement waiver programs enacted by other Regional Water Boards (see p.16, referring to R1-2012-003 and R2-2003-0094). Mr. Sweeney argues that both the San Francisco and North Coast Regional Water Quality Control Boards have made a factual finding that small dairies do not pose a threat to water quality. While this argument is not on point to the issues in the current proceeding, the Prosecution Team would like to address the arguments made by Mr. Sweeney.

When the Dairy General Order was adopted in 2007, the Central Valley Water Board considered exempting small dairies from monitoring requirements, but eventually rejected this approach. In 2007 evidence existed to show that small dairies pose a threat to water quality. In comparison to the Central Valley Region, the North Coast and San Francisco Bay Regions have very different climatic, geologic, and land use conditions that justify different permitting conditions for small dairies. Those regions have fewer dairies and the spacing between individual dairies is greater. The overwhelming majority of dairy cattle in California are in the Central Valley Region, and are concentrated in areas surrounded by intensive agricultural use that presents a significant threat to groundwater quality, of which dairies are a contributor. Unlike the North Coast and San Francisco Bay Regions, the Central Valley receives comparatively little precipitation and groundwater recharge of an aquifer that it is extensively used for drinking water, industrial supply, agricultural supply, and other uses.

The Central Valley Water Board decided that it was necessary to regulate small dairies in order to identify water quality problems. Collection of information through the Dairy General Order allows the Board to determine what improvements are necessary to improve water quality. It

also allows necessary improvements to be planned so they can be implemented in an effective and efficient manner that protects water quality throughout the Region.

**II. The Central Valley Water Board Already Made a Factual Determination About Many Issues Raised by Sweeney Dairy in its Evidence Submission.**

The Central Valley Water Board has already determined that Sweeney Dairy is subject to the reporting requirements of the Dairy General Order, and has previously voted to adopt an administrative civil liability against it for a failure to file the 2009 Annual Report and a Waste Management Plan (Administrative Civil Liability Order [ACLO] R5-2011-0068, adopted on 13 October 2011). In its June 19, 2012 evidence submission for the present matter, Sweeney Dairy raises many of the exact same issues previously raised in its briefs and evidence submissions for ACLC R5-2011-0562. These issues were considered and addressed in adjudicative proceedings by both a Hearing Panel of three board members, and the full Central Valley Water Board. The Board found Mr. Sweeney's arguments to be unpersuasive, and imposed administrative civil liability based on Sweeney Dairy's failure to comply with the reporting requirements of the Dairy General Order.

The Prosecution Team believes that many of Sweeney Dairy's arguments in its June 19, 2012 evidence submission are duplicative to arguments raised during the adjudicative proceedings for ACLO R5-2011-0068. As such, they should be barred for reconsideration by collateral estoppel (*People v. Sims* (1982) 32 Cal.3d 468, 489). Collateral estoppel bars the relitigation of issues of fact or law that have already been necessarily determined as part of an earlier case. It promotes judicial economy, preservation of the integrity of the judicial system by avoiding inconsistent judgments, and protection of litigants from harassment by repeated litigation (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at pp. 342-343).

Collateral estoppel extends to agency determinations of legal issues (*Guild Wineries and Distilleries v. Whitehall Co., LTD* (9th Cir. 1988) 853 F.2d 755, 758-759, citing *United States v. Utah Construction Company* (1966) 384 U.S. 394) Collateral estoppel applies in claims brought

in future administrative proceedings if the agency met the prerequisite requirements when arriving at its decision in the first instance: (1) the issue decided in a prior proceeding is identical to the issue sought to be relitigated, (2) the issue was actually litigated in the prior proceeding, (3) the issue was necessarily decided in the prior proceeding, (4) the prior proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral estoppel is asserted is the same as, or in privity with, a party to the prior proceeding (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341). In addition, in evaluating whether to apply collateral estoppel, an agency must consider the public policies underlying the doctrine. *Ibid.* at 342-343.

Sweeney Dairy should be barred from relitigating the issues that have been previously resolved by this Board. All of the prerequisites to the application of collateral have been satisfied. First, Sweeney Dairy's current evidentiary submission repeats verbatim the same contentions and arguments that were made in evidence submissions for the previous enforcement action. Second and Third, Sweeney Dairy seeks to relitigate issues that were properly raised during the administrative proceedings for ACLC R5-2011-0562 and decided by the Central Valley Water Board. Fourth, the previous proceeding resulted in a final judgment on the merits, which was memorialized in ACLO R5-2011-0068. Fifth, Sweeney Dairy is the same party involved in both the present issue and ACLC R5-2011-0562. Finally, public policy supports the application of the collateral estoppel doctrine, as precluding Sweeney Dairy from raising the same issues in successive petitions will promote judicial economy and protect the Central Valley Water Board from being harassed by repeated litigation.

**A. ACLC R5-2012-0542 is not premature and does not result in a deprivation of Sweeney Dairy's Due Process**

**1. Sweeney Dairy's Arguments are Duplicative and Should be Barred for Reconsideration by Collateral Estoppel**

Sweeney Dairy argues that the Central Valley Water Board cannot take enforcement action against Sweeney Dairy under ACLC R5-2012-0542 until it has "heard and denied our request and after we have exhausted all appeal and other legal remedies afforded us under the Water

Code.” (Discharger’s Evidence Submission at p.11). This argument is identical to an argument raised by Mr. Sweeney during the adjudicative proceeding for R5-2011-0562 on July 14, 2011. At that proceeding, Mr. Sweeney testified that, “Your agency cannot contend that we have violated the filing requirement until such time as the Central Valley Board has heard and denied our request and after we have exhausted our appeal and other legal remedies afforded us under the Water Code.” (Transcript from July 14, 2011 Panel Hearing, p. 38). Both the Hearing Panel and the full Board rejected Mr. Sweeney’s arguments and determined that Sweeney Dairy was legally obligated to submit Annual Reports under the Dairy General Order. (ACLO R5-2011-0068). There is no need to revisit this issue in the current proceeding.

**2. There is no statutory obligation to grant a full adjudicative hearing in response to an application for review of WDRs under Water Code 13263(e)**

Mr. Sweeney’s arguments were unpersuasive in 2011, and are unpersuasive now. Neither the Water Code nor the California Code of Regulations requires that the Central Valley Water Board grant a full adjudicative hearing to address Mr. Sweeney’s request for review and revision of the waste discharge requirements in the Dairy General Order<sup>1</sup> pursuant to Water Code 13263. Mr. Sweeney’s request for a waiver from the Dairy General Order requirements should have been raised to the full Board during the public forum and comment period.

**a. Central Valley Water Board Staff may make recommendations about which items should be included on the Board’s Agenda**

Mr. Sweeney correctly points out that Water Code 13263(e) allows an affected person to *apply* to a Regional Board to review and revise Waste Discharge Requirements. However, there is no affirmative statutory requirement for a Regional Board to hold a hearing to contemplate modification of WDRs as they apply to an affected person. A hearing is required before a

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<sup>1</sup> The Dairy General Order MRP is a Waste Discharge Requirement (WDR) that was adopted by the Central Valley Water Board under authority of Water Code 13263. Water Code Section 13263(a) allows a Regional Board to adopt waste discharge requirements “after any necessary hearing,” while Water Code 13263(i) allows a Regional Board to prescribe general waste discharge requirements for a category of discharges, such as discharges from dairy farms. The Central Valley Water Board adopted the Dairy General Order under authority of 13263(a) and (i).

Regional Board *adopts* a WDR under Water Code 13263(a), but Water Code 13263(e) does not require a Regional Board to hold a hearing upon a *request for modification* of WDRs. The decision to place a matter on the Board's agenda remains within the discretion of Central Valley Water Board management in consultation with the Executive Officer as the gatekeeper.

In its evidence submission, Sweeney Dairy argues that "Section 13223(a) of the Water Code specifies that the Central Valley Board may not delegate modification of Waste Discharge Requirements...We have a right to appear before the Central Valley Board to ask for a modification or waiver from any of the Order's general Waste Discharge Requirements. Even a decision to not hear our request for relief would have to be made by the Central Valley Board, not by its staff." Mr. Sweeney correctly points out that 13223(a) prohibits the delegation of the issuance, modification or revocation of any waste discharge requirement, but his claim is somewhat incomplete. Nothing in this Section of the Water Code requires a Regional Board to hold a hearing to discuss the modification of a waste discharge requirement.

**b. Mr. Sweeney could have requested full Board consideration of an application for waiver from WDRs at Public Forum**

Mr. Sweeney submitted a request for an extension for reporting requirements to Central Valley Water Board staff on April 7, 2010. Central Valley Water Board staff correctly informed Mr. Sweeney that they had no authority to modify the reporting requirements (Transcript from July 14, 2011 Panel Hearing, p. 35). They reviewed Mr. Sweeney's request but did not schedule the item to be considered before the full Board. Data that are collected for the annual reports must be gathered in a timely manner and cannot be recreated. Given the time sensitive nature of this data collection process, Board staff did not feel an extension of the annual reports would be appropriate, and did not feel comfortable making that recommendation for consideration by the full Board at a future meeting (Transcript from July 14, 2011 Panel Hearing, p. 50-51). Instead, Board Staff advised Mr. Sweeney that he was free to address the issue during the public forum

section at a future meeting of the Central Valley Water Board (Transcript from July 14, 2011 Panel Hearing, p. 35).

Mr. Sweeney argues that it was not fair for the Central Valley Water Board to consider his application for an extension from the Dairy General Order reporting requirements during Public Forum because he would be limited to a 3 minute presentation. At the July 14 proceeding, Mr. Sweeney admitted that he never appeared before the Central Valley Water Board during public forum as recommended by the Board staff. Panel Chairman Longley contemplated Mr. Sweeney's arguments and Board staff's recommendations during the July 14 Panel Hearing adjudication. He noted that "If the Board deems that they want to hear more [during public forum], they can ask for more. So you have three minutes to show why you should be allowed to present more...If I had been in your shoes, I certainly would have taken the opportunity of that three minutes to come and talk to the Board. People do, and they find it was time well spent." (Transcript from July 14, 2011 Panel Hearing, p. 48).

The record shows that both Central Valley Water Board staff and the Board members contemplated Mr. Sweeney's requests and offered him a forum in which to make his requests. Contrary to Mr. Sweeney's claims, there is absolutely no evidence in the record that suggests the Prosecution Team or Former Board Chair Hart prevented Sweeney Dairy from requesting a hearing for modification of the 2007 Dairy General Order. To date, Mr. Sweeney has never appeared at public forum at any subsequent Board meetings to make a formal application for review of the WDRs under the Dairy General Order. Mr. Sweeney was not deprived of his due process because he has been afforded the opportunity to speak at any subsequent Board meeting and has rejected the opportunity to appear.

### **3. An Application for Modification of WDRs under 13263(e) Does Not Result in an Automatic Stay of Reporting Requirements.**

In its evidence submission, Sweeney Dairy argues that, "Had the Central Valley Board's staff scheduled a hearing before the Board, as we requested...there is the possibility that the board



would have granted relief from some or all of those reporting requirements, including the (submission of the 2010 Annual Report).” A request for a modification of waste discharge requirements does not create an automatic procedural right to a hearing before the Central Valley Board (Transcript from July 14, 2011 Panel Hearing, p. 25).

**a. This Issue has been Previously Considered by the Board and should be Barred by Collateral Estoppel**

Like the previous issues discussed, this issue was raised by Sweeney Dairy during the proceedings for ACLO R5-2011-0068 and addressed by the Prosecution Team Counsel. The Central Valley Water Board has already considered Mr. Sweeney’s request for extension or waiver of the Dairy General Order reporting requirements, and has determined that it will not grant Mr. Sweeney a hearing on the matter or an extension (Transcript from July 14, 2011 Panel Hearing, p. 48-52). It is inappropriate for Mr. Sweeney to raise the exact same issue a second time and argue that the Central Valley Water Board denied his request in an attempt to seek a different result.

**b. Sweeney Dairy is Required to Comply with the Reporting Requirements of the Dairy General Order While it Seeks Administrative and Judicial Remedies**

The act of submitting an application to the Central Valley Water Board for review and revision of WDRs by a discharger under Water Code 13263(e) does not eliminate the requirement to comply with monitoring and reporting requirements. The Standard Provisions and Reporting Requirements B.8. of the Dairy General Order state, “[t]he filing of a request by the Discharger for modification, revocation and reissuance, or termination of the Order, or notification of planned changes or anticipated noncompliance, does not stay any condition of the Order.” To date, Sweeney Dairy has not been granted a waiver or modification from the monitoring and reporting requirements of the Dairy General Order by the Central Valley Water Board. The facility continues to be regulated by the Central Valley Water Board as an existing milk cow dairy under Order R5-2007-0035 and is required to comply with all reporting requirements.

The State Water Board is the only regulatory body that has the authority to grant a stay under Water Code §13321 and 23 CCR §2053. The stay requirements are discussed in *In the Matter of the Petition of the Department of the Navy*, WQ 2009-0013 (emphasis added):

The State Water Board recognizes the extraordinary nature of a stay remedy and places a heavy burden on the petitioner seeking a stay. (Order WQ 86-01 (City of Colton).) A stay may be granted only if the Navy alleges facts and produces proof of all of the following: (1) substantial harm to the Navy or to the public interest if a stay is not granted; (2) a lack of substantial harm to other interested persons and to the public interest if a stay is granted; and (3) substantial questions of law or fact regarding the disputed action. (Cal Code Regs., tit. 23, § 2053.) It is incumbent upon the Navy to meet all three prongs of the test **before a stay may be granted**. (Order WQ 2002-0007 (County of Los Angeles).) In addition, the issue of whether a stay is appropriate is not whether the Navy might prevail on any of the merits of its claims, or whether the Navy will suffer harm over the term of the permit. Rather, the issue must be judged in the temporal sense—the Navy must prove that it will suffer substantial harm if a stay is not granted for the period of time pending resolution of the petition on the merits...(Id.)

Sweeney Dairy has not been issued a stay by the State Board. It must comply with the reporting requirements of the Dairy General Order until which time a stay is granted by the State Board.

Practically speaking, Mr. Sweeney argues that his application for review or modification of the WDRs by the Central Valley Water Board, which could potentially eliminate the requirement to submit the annual report, should automatically grant him the exact relief he requested from the Board. This surely cannot be the appropriate outcome. The obligation to continue to comply with the Dairy General Order becomes even more apparent where a requirement of the Dairy General Order, submission of the Annual Report, hinges on information that cannot be re-created after-the-fact. The Water Code does not contemplate the dismissal of waste discharge requirements during a Regional Board's review of a modification or waiver. Moreover, a resulting stay would be unfair to the other dairy producers enrolled under the Dairy General Order and would diminish the Order's purpose of ensuring ongoing protection of water quality.

### **III. Mr. Sweeney's Attempts to Challenge the Propriety of the Underlying General Order are Improper During This Enforcement Proceeding**

### **A. Mr. Sweeney's Attack on the Dairy General Order is Untimely**

In his 19 June 2012 submission, Mr. Sweeney argues that the Dairy General Order is invalid for a number of reasons detailed in Section E.2. of his evidence submission. Some of the evidence submitted by Mr. Sweeney is new to this proceeding. However, the underlying basis for the challenge remains the same. Mr. Sweeney is attempting to challenge the validity of the Dairy General Order in an enforcement proceeding. This is a collateral attack on the Order itself (Transcript from July 14, 2011 Panel Hearing, p. 24). The Central Valley Water Board contemplated this argument in July, 2011 and October, 2011 and rejected it.

The appropriate window of time to challenge the reporting requirements in Monitoring and Reporting Program No. R5-2007-0035 has passed. If Mr. Sweeney felt aggrieved by either the reporting requirements or the deadlines in which to submit the reporting requirements as established in Table 1 of the MRP, these issues should have been raised within the appropriate time period subsequent to the Dairy General Order's adoption. Pursuant to CWC section 13320, Mr. Sweeney had 30 days following 3 May 2007 to petition the Central Valley Water Board's action in adopting the Dairy General Order. This subsequent attempt to challenge the legality of the reporting requirements in the Dairy General Order in the present enforcement proceeding is merely a collateral attack on the Dairy General Order and should not be permitted.

Moreover, challenging the legality of the underlying requirement in the MRP, specifically the requirement to submit the 2010 Annual Report, at this juncture is also improper based on the Discharger's previous acquiescence to the very requirements he is now challenging. Previously, the 2007 and 2008 Annual Reports were timely submitted by the Discharger. (Attachment 1 with date stamp received.) Subsequent arguments in this proceeding challenging the annual reporting requirements should be deemed waived based on the Discharger's previous compliance with those very same requirements in the MRP. It was not until the

Administrative Civil Liability Complaint was issued did the Discharger challenge the propriety of the underlying General Order.

**B. Mr. Sweeney's Conclusions About the Impact of the Dairy General Order on Small Dairy Attrition Rates Are Not Based In Fact**

Mr. Sweeney makes several statements arguing that the cost of complying with the Dairy General Order led to the decline in small dairies in the Central Valley. These arguments are oversimplified and rely upon a very loose interpretation of fact. First, Mr. Sweeney's references several cost estimates from the Administrative Record<sup>2</sup> that are not accurate. Central Valley Water Board staff estimates that the costs associated with complying with the Dairy General Order Annual Reporting Requirements are approximately \$2,500 (See R5-2012-0542, Attachment A.) Second, Mr. Sweeney references attrition data for small dairies submitting Annual Reports to the Fresno Office since 2007 in an attempt to show that the cost associated with complying with the Dairy General Order resulted in many small dairies closing down. This conclusion ignores many key facts. Like other small businesses in the economic downturn, small dairies are declining for a variety of economic reasons. As Mr. Sweeney points out, in 2008 and 2009 "a combination of low milk prices and high feed costs that were unprecedented in recent memory" took a tremendous toll on the Dairy industry (June 19 Evidence and Policy Statements, p.2). Much of the attrition suffered by small dairies resulted from economic conditions unrelated to adoption of the Dairy General Order, and not from the cost associated with complying with the Dairy General Order. Mr. Sweeney's claims are unsubstantiated without addition data or analysis.

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<sup>2</sup> Mr. Sweeney references testimony from Paul Souza from 2007 estimating that the cost to comply with the Dairy General Order would be "as high as \$89,000 initially and \$58,000 annually per dairy. This estimate has not proven to be accurate.

#### **IV. Conclusion**

Sweeney Dairy has submitted legal arguments in this proceeding that are nearly identical to the arguments presented to the board during the proceedings for ACLC R5-2011-0562. Mr. Sweeney did not timely challenge the Dairy General Order's requirement to submit a 2010 Annual Report, and arguments against these requirements should be rejected on jurisdictional grounds in this proceeding. Additionally, any evidence submitted by the Sweeney Dairy in support of these arguments should be excluded from the record on the basis of relevance. The sole issue of this administrative civil liability hearing is whether the Discharger submitted the 2010 Annual Report by 1 July 2011 as required by the MRP, as amended. The Prosecution Team contends that it is clear that the report was not submitted by the required deadlines and recommends to the Board the imposition of an administrative civil liability penalty of \$7,650 as proposed.

Regional Water Boards have the autonomy to make their own decisions regarding the proper mechanism to regulate discharges to water. The Central Valley Water Board has determined that it is necessary to regulate small dairies under the Dairy General Order to protect water quality in the region.

Dated: July 9, 2012

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY  
CONTROL BOARD, CENTRAL VALLEY  
REGION PROSECUTION TEAM

By:

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Ellen Howard